HOCK CHNAY SDN BHD

v.

BONG KONG MIN

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ MOHAMAD JCA
HASHIM YUSOFF JCA
AZMEL MAAMOR JCA
[CIVIL APPEAL NO: Q-02-607-98]
12 DECEMBER 2007

CONTRACT: *Sale and purchase of land - Rescission - Breach - Payment of deposit - Construction of term of contract - Whether there was non-compliance*

CONTRACT: *Construction - Term of payment - Deposit - Whether meaning clear and unambiguous - Whether there was non-compliance*

LAND LAW: *Sale of land - Rescission - Breach - Payment of deposit - Construction of term of contract - Whether there was non-compliance*

The plaintiff/respondent, in seeking to rescind a sale and purchase agreement for a piece of land ('said land') which he had entered into with the defendant on 10 April 1984 ('SPA'), alleged that the defendant/appellant had committed breach of the SPA, namely: (i) fraudulent misrepresentation; and (ii) non-compliance of cl. 2(a) of the SPA ('cl. 2'). The learned High Court judge found that there was no evidence of fraudulent misrepresentation. He, however, held that the appellant had failed to comply with the provision of cl. 2(a) in that the appellant did not pay the sum of RM15,000 as deposit to the respondent upon the signing of the SPA. In view of the breach of cl. 2(a), the learned judge ordered that the SPA be terminated. On the basis of such finding, the learned judge also dismissed the appellant's counterclaim seeking an order requiring the respondent to fulfil the terms of the SPA. The appellant, being dissatisfied with the learned judge's decision, appealed.

Held (allowing the appeal)
Per Azmel Maamor JCA delivering the judgment of the court:

(1) The meaning of cl. 2(a) of the SPA, upon examination, was very clear and unambiguous. Literally it meant the vendor had acknowledged receiving the money amounting to RM15,000 as

deposit, and that was a conclusive statement in writing on a document duly signed and admitted by the respondent. The words "the receipt of which sum" must necessarily mean the money in question. The crucial issue was whether the sum of RM15,000 was paid to the respondent. At the hearing, evidence was adduced that the respondent had admitted to his solicitor ('DW3') having received the RM15,000. That sum of RM15,000 was alleged not to have been paid at the time the SPA was signed. However, it would not really matter whether the payment was made on or before the signing of the SPA since, based on the wording of cl. 2(a), the sum would appear to have been paid before the signing of the SPA because the respondent had acknowledged receipt of it. The word "receipt" as mentioned in cl. 2(a) did not mean documentary receipt but receipt of the sum of RM15,000. Having regard to the wording of cl. 2(a) coupled with DW3's evidence, there should not be any doubt whatsoever that the sum of RM15,000 had been received by the respondent. Although the sum was paid before and not at the time of the signing of the SPA, that should not be regarded as a valid ground to rescind the SPA. The learned judge had erroneously ignored the appellant's statement that the amount of money had been paid earlier. He had also failed to give a proper construction to cl. 2(a) in not heeding that the respondent had acknowledged receipt of the said sum of money. Based on these circumstances, it was clear that the appellant had paid the deposit of RM15,000 as acknowledged by the respondent under cl. 2(a). The learned judge had made a serious error in ruling that the appellant had committed a breach of cl. 2(a). (paras 18, 20, 21, 22, 24 & 25)

[Allowing the appellant's counterclaim in prayers (c) and (d), with damages in prayer (c) to be assessed.]

Bahasa Malaysia *Translation Of Headnotes*

Plaintif/responden, dalam usaha untuk membatalkan perjanjian jualbeli sebidang tanah ('tanah tersebut') yang dimasukinya dengan defendan pada 10 April 1984 ('SPA'), mendakwa bahawa defendan/perayu telah memungkiri SPA seperti berikut: (i) salah nyata fraud; dan (ii) tidak mematuhi perenggan 2(a) SPA ('per. 2'). Yang arif hakim Mahkamah Tinggi mendapati tiada keterangan mengenai salah nyata fraud. Beliau bagaimanapun memutuskan bahawa perayu tidak mematuhi per. 2(a) kerana gagal membayar

deposit sebanyak RM15,000 kepada responden ketika menandatangani SPA. Berdasarkan pelanggaran per. 2(a) tersebut, maka yang arif hakim memerintahkan supaya SPA ditamatkan. Berdasarkan alasan yang sama, yang arif hakim juga menolak tuntutan balas perayu untuk perintah supaya responden mematuhi terma-terma SPA. Tidak berpuas hati, perayu merayu terhadap keputusan yang arif hakim.

Diputuskan (membenarkan rayuan)
Oleh Azmel Maamor HMR menyampaikan penghakiman mahkamah:

(1) Atas penelitian, maksud per. 2(a) SPA adalah jelas dan tidak kabur. Secara literal, ia bermaksud bahawa penjual mengakui telah menerima wang berjumlah RM15,000 sebagai deposit, dan itu terbit dari satu kenyataan bertulis yang konklusif di atas satu dokumen yang diakui dan ditandatangani dengan sempurnanya oleh responden. Perkataan "penerimaan wang yang mana" semestinya merujuk kepada wang yang berkenaan. Isu pentingnya adalah sama ada jumlah RM15,000 tersebut telah dibayar kepada responden. Di pendengaran, keterangan dikemukakan bahawa responden telah mengaku kepada peguamcaranya ('DW3') bahawa ia telah menerima RM15,000 tersebut. Jumlah RM15,000 ini didakwa tidak dibayar semasa SPA dimeterai. Bagaimanapun, adalah tidak menjadi hal sama ada pembayaran dibuat semasa atau sebelum pemeteraian SPA, oleh kerana, berdasarkan perbahasaan per. 2(a), wang nampaknya telah dibayar sebelum pemeteraian SPA memandangkan responden telah mengakui menerimanya. Perkataan 'penerimaan' seperti yang disebut di dalam per. 2(a) tidak bermaksud penerimaan dokumen tetapi penerimaan wang berjumlah RM15,000. Mengambilkira perbahasaan per. 2(a) serta keterangan DW3, tiada kesangsian bahawa jumlah RM15,000 tersebut telah diterima oleh responden. Walaupun jumlah dibayar sebelum dan tidak semasa pemeteraian SPA, itu tidak menjadi satu alasan untuk membatalkan SPA. Yang arif hakim khilaf kerana tidak mengendahkan kenyataan perayu bahawa jumlah wang telahpun dibayar sebelumnya. Yang arif hakim juga gagal memberikan pentafsiran yang betul kepada per. 2(a) apabila tidak mengambilkira bahawa responden telah mengakui menerima jumlah wang tersebut. Berdasarkan keadaan-keadaan ini, jelas bahawa perayu telah membayar deposit RM15,000 seperti yang diakui oleh responden di

bawah per cl. 2(a). Yang arif hakim telah melakukan kesilapan yang serius apabila memutuskan bahawa perayu telah memungkiri per. 2(a).

[Membenarkan tuntutan balas perayu seperti di prayer (c) dan (d), dengan gantirugi di prayer (c) ditaksir.]

Legislation referred to:
Land Code (Cap 81) (Sarawak), s. 2

For the appellant - RJ Noel; M/s LK Ong & Co
For the respondent - John Shek; M/s John Shek, Sigar, Wei Yee & Co

[Appeal from High Court, Kuching; Civil Suit No: KG 77-1992]

Reported by Suresh Nathan

JUDGMENT

Azmel Maamor JCA:

[1] The plaintiff in the court below, seeking to rescind the sale and purchase agreement (SPA) which he had entered into with the defendant on 10 April 1984, alleged that the defendant had committed breach of the SPA namely:

(a) fraudulent misrepresentation; and

(b) non-compliance of cl. 2(a) of the said agreement.

[2] The learned High Court judge found there was no evidence of fraudulent misrepresentation. However it was his finding that the defendant had failed to comply with the provision of cl. 2(a) of the SPA in that the defendant did not pay the sum of RM15,000 to the plaintiff upon the signing of the SPA. In view of the breach of the said cl. 2(a) the learned judge ordered that the SPA be terminated. On the basis of such finding the learned judge also dismissed the defendant's counter-claim seeking an order requiring the plaintiff to fulfil the terms of the SPA.

[3] Being dissatisfied with the decision of the learned judge the defendant lodged an appeal to this court. We have allowed the appeal with costs. We shall now give our reasons.

[4] The background facts are as follows. The respondent, the plaintiff in the court below, is the owner of a piece of land with an area of 1.4771 hectares in Miri, Sarawak (the said land).

Through discussions held between the respondent and the directors of the appellant, the defendant in the court below, it was agreed between them that the appellant would purchase the said land and take the necessary steps to apply for and obtain conversion and subdivision of the said land with a view to developing it by constructing on it a number of units of shophouses and residential houses.

[5] Towards that objective the respondent and the appellant entered into a Memorandum of Understanding (MOU) as well as a sale and purchase agreement (SPA) on 10 April 1984. The SPA stipulates the purchase price of the said land to be RM1,500,000 and upon the signing of it the appellant was required to pay a sum of RM15,000 to the respondent as deposit. The balance of the purchase price of RM1,485,000 was to be paid by the appellant after the completion of the development on the said land.

[6] As stated in the MOU the appellant would sell 4 units of shophouses constructed on the said land at the price of RM400,000 per unit. Under cl. 3 of the SPA the appellant was allowed "to DEAL on the said land within the full meaning and context as stated under the Sarawak Land Code".

[7] In addition to the above the respondent had also created a Power of Attorney (PA) in favour of the appellant granting certain powers to and authorising the appellant to do, act and/or execute in connection with the development of the said land. Clause 6 of the PA states:

> 6. And generally to sign and seal as my act and deed to deliver any deed of instrument in writing and to do every other things whatsoever which may be necessary for the completion of the acts, deeds and things aforesaid and in general required to be carried out in connection therewith or incidental thereof.

The PA, even though created on 31 March 1984, was only registered on 12 April 1984.

[8] At the hearing the appellant/defendant called 3 witnesses. Philip Ong Liang Kui (DW2), a director of the appellant, said in his evidence that the deposit of RM15,000 had been paid to the respondent upon the signing of the SPA. He also said that the sub-division approvals had been obtained from the relevant authorities in 1984 itself. Following that the appellant began

A appointing the architectural and engineering professionals for purposes of applying for and obtaining the necessary development and planning approvals and had also appointed contractors to begin the earthworks on the site.

B **[9]** It is common knowledge that in order to carry out development on any land the financial resources have to be obtained in order to meet the necessary expenses. Usually developers would obtain the required financial facilities from a bank or financial institution. But such facilities would only be granted C by the bank if sufficient security is given. It is a common practice for a developer to use the land to be developed as collateral in order to obtain the required financial facilities from the bank or financial institution.

D **[10]** In the instant case the appellant had intended to make use of the said land in order to obtain the necessary financial resources for the development of the said land. It was for that reason that cl. 3 of the SPA was drafted and agreed on. It reads:

> 3. It is mutually agreed that the Vendor shall allow the E Purchaser to DEAL on the said land within the full meaning and context as stated under the Sarawak Land Code, in which event, the directors of the Purchaser shall jointly and severally indemnify the Vendor against any loss that may arise thereof.

F **[11]** The word "DEAL" under the Sarawak Land Code is defined under s. 2 as follows:

> 'dealing' means every transfer, charge, lease or other instrument affecting any estate or interest under the Code.

G It must have been for such purpose that the title to the said land was handed to the appellant by the respondent after the signing of the SPA.

[12] However, in the course of making the necessary preparations H for the development of the said land, including obtaining the necessary development and planning approvals from the relevant authorities, the economic recession hit Malaysia including Sarawak with the result that the development of the said land had to be temporarily shelved.

I

[13] Towards the end of the 1980s the Malaysian economy began to recover. Prices of land in Miri, Sarawak, had increased and demand for shophouses had also increased. When the appellant started to recommence works on the said land the respondent decided to disallow the appellant from using the said land as collateral to obtain the financial facilities for its development. It was for that reason that the respondent, in February 1991, applied for and registered a caveat in respect of the said land prohibiting the registration of any transfer or any other dealing affecting it.

[14] It was subsequent to that action that the respondent began to raise the issue of non-payment of the deposit of RM15,000 by the appellant. Two letters were issued by the respondent's counsel to the appellant dated 21 August 1991 and 1 October 1991 alleging that the appellant had not paid the deposit at the time the SPA was signed on 10 April 1984. But the appellant contended that the sum had been paid to the respondent.

[15] At the High Court hearing the learned judge made a finding that the deposit of RM15,000 was not paid by the appellant to the respondent at the time when the SPA was signed. As such he ruled that cl. 2(a) of the SPA had been breached by the appellant and ruled that the respondent had the right to terminate the SPA. At the same time the learned judge ruled that the appellant's counter-claim be dismissed.

Hence the appeal by the appellant against the decision of the learned judge.

[16] At the outset, it would appear rather odd that the respondent only decided to raise the issue of the non-payment of the deposit of RM15,000 some time in 1991, after a lapse of more than six years after the signing of the SPA. This was done after the respondent decided to register a caveat on the said land prohibiting the appellant the right to deal with it. It was the time when the Malaysian economy had fully recovered and the value of landed property had shot up. It could therefore be assumed that the value of the said land had also gone up well above RM1.5 million. Due to the increase in the market value of landed property during that time it would appear to be no longer so profitable to dispose of the said land at the price of RM1.5 million. Bearing such scenario in mind we will now examine the facts of this case.

[17] We shall begin by examining the provision of cl. 2(a) of the SPA which reads:

> (a) A sum of Malaysian Ringgit Fifteen Thousand only (M$15,000/=) shall be paid upon the signing hereof as deposit cum part payment towards the consideration of the said land, the receipt of which sum the Vendor hereby acknowledges.

[18] In our view the meaning of this cl. 2(a) is very clear and unambiguous. Literally it means the vendor (respondent) had acknowledged receiving the money amounting to RM15,000 as deposit. And that is a conclusive statement in writing on a document duly signed and admitted by the respondent. The words "the receipt of which sum" must necessarily mean the money in question.

[19] It must be pointed out that the SPA was prepared and witnessed by the solicitor, King Chui Kek, who had acted on behalf of the respondent. He was called as a witness at the proceeding in the High Court. Under cross-examination King Chui Kek (DW3) said that he explained all the clauses of the SPA to both parties. It therefore means that the content of cl. 2(a) must also have been explained to the respondent. That the sum of RM15,000 under cl. 2(a) had been received by him was corroborated by the evidence of DW3 when he said in his answer to a question by the court:

> **I asked the Plaintiff whether he received the RM15,000 and he said yes.** There was no payment of RM15,000 made on signing of this agreement. (emphasis added).

[20] The crucial issue is whether the sum of RM15,000 was paid to the respondent. At the hearing, evidence was adduced that the respondent had admitted to his solicitor (DW3) having received the RM15,000. That sum of RM15,000 was alleged not to have been paid at the time the SPA was signed. In our view it would not really matter whether the payment was made on or before the signing of the SPA. Based on the wording of cl. 2(a) the sum would appear to have been paid before the signing of the SPA because the respondent had acknowledged receipt of it.

[21] We wish to point out that the word "receipt" as mentioned in cl. 2(a) does not mean documentary receipt. In its context we are of the strong view that it means receipt of the sum of RM15,000.

[22] Having regard to the wording of cl. 2(a) coupled with the evidence of DW3 there should not be any doubt whatsoever that the sum of RM15,000 had been received by the respondent. That the sum was paid before and not at the time of the signing of the SPA should not be regarded as a valid ground to rescind the SPA.

[23] We shall now consider the reason given by the learned judge in ruling that the appellant had breached cl. 2(a) of the SPA. In his grounds of judgment the learned judge ruled that it was the requirement of cl. 2(a) that the sum of RM15,000 must be paid at the time when the SPA was signed and not before it. In other words he emphasized on the time when the sum must be paid to the respondent as required under cl. 2(a).

[24] In our view the learned judge had erroneously ignored the appellant's statement that the amount of money had been paid earlier. He also failed to give a proper construction to cl. 2(a) in not heeding that the respondent had acknowledged receipt of the said sum of money. To him the word "receipt" means documentary receipt and the production of it was essential. With respect we disagree with the decision made by the learned judge. In addition he had also omitted to consider in his decision the evidence given by DW3 in answer to the very question posed by the court that the respondent had admitted to him having received the sum of RM15,000.

[25] Based on the circumstances as mentioned above we arrived at the finding that the appellant had paid the deposit of RM15,000 as acknowledged by the respondent under cl. 2(a). The learned judge had made a serious error in ruling that the appellant had committed a breach of cl. 2(a) of the SPA. We therefore allowed the appellant's appeal with costs. On the facts of this case we also allowed the appellant's counter-claim in Prayers (c) and (d). The damages in Prayer (c) will have to be assessed. The deposit is to be refunded to the appellant.